TABLE OF CONTENTS

TABLE OF CONTENTS (Cont.)

INDEX OF AUTHORITIES

I

Statutes, Rules and Orders

II

Decisions

INDEX OF AUTHORITIES (Cont.)

III
TEXT BOOKS

In the Supreme Court

of the United States

No.....

OCTOBER TERM, 1946

NANNY WOOD HONEYMAN, Executrix of the Estate of DAVID T. HONEYMAN, Deceased, (substituted for DAVID T. HONEYMAN) and NAN WOOD HONEYMAN, *Petitioners,*

-vs-

MATT S. HUGHES, Trustee in Bankruptcy of Honeyman Hardware Company, a corporation, bankrupt, *Respondent.*

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Petitioners' statement of "The Matters Involved" (Petitioners' Brief, Page 1) and "Statement Of The Case" (Petitioners' Brief, Page 8) are incomplete. A

complete statement follows:

Honeyman Hardware Company, a corporation, was adjudged a bankrupt on May 25, 1942 (R. 7).

On and prior to said date Petitioners' Testator, David T. Honeyman, hereinafter referred to as David, held the naked legal title to a parcel of real property described herein as "General Electric Building" pursuant to an agreement. This proceeding relates to said property and agreement.

Said agreement (same appears R. 18, and was offered and received as Ex. Q.Q., R. 365) was entered into on April 20, 1933 between three brothers, David, Thomas D. and James D. Honeyman. It recites that said real property, then standing in the name of David, shall be conveyed to Honeyman Hardware Company; that a deed conveying said property to Honeyman Hardware Company shall be held in escrow by David for the purpose of securing payment of two promissory notes executed by Thomas D. and James D. Honeyman, aggregating $25,000.00, and also for the purpose of securing payment of a note from David and his wife to Oregon Mutual Life Insurance Company; that Honeyman Hardware Company shall be entitled to collect and retain all rentals; that an existing lease on the premises to General Electric Company be assigned and transferred by David to Honeyman Hardware Company; that prior agreements between the parties relating to the property be cancelled and annulled.

This agreement was never vacated, modified or amended (R. 169). It remains the final agreement of

the parties (Referee's Memorandum Opinion, R. 37).[1]

The property was originally purchased with funds of bankrupt corporation (R. 165). It was deeded to David in 1928 for the purpose of procuring a loan in his name from Oregon Mutual Life Insurance Company (R. 167). David never owned any beneficial interest in the property (R. 167).

On December 1, 1942, David, as lessor, executed a five year renewal lease to the General Electric Company, as lessee of the property, to take effect May 31, 1943 (Ex. Q., offered and received R. 159, but not made part of printed record).

On June 4, 1943, said renewal lease, including the rental thereby secured, was assigned by David to the Respondent (R. 159). This assignment was made in compliance with a summary order of the Bankruptcy Court directing David to assign the lease, from which order no review or appeal was taken (R. 159, 241).

On September 28, 1943, in a suit in the District Court of the United States, for the District of Oregon, wherein General Electric Company was plaintiff, and

---

[1]Statements appear in Petitioners' Brief, at pages 2 and 9, that a subsequent agreement was entered into whereby David owned the property absolutely. Petitioners' Ex. E.E. for identification in support thereof was rejected by the Referee because it was not a signed agreement of the parties changing the terms of the agreement of April 20, 1933 (Ex. Q.Q.); it was only a memorandum containing suggestions (R. 244). Moreover it was not in compliance with the Statute of Frauds, O.C.L.A., Section 2-909 (6), which provides that unless in writing and subscribed, "an agreement * * * * for the sale of real property, or of any interest therein;" is void. This statute covers the sale of an equitable interest as well as the sale of the legal title: *Chenoweth & Johnson et al v. Lewis,* 9 Ore. 150.

Petitioners make no assignment of error on the rejection of said memorandum or upon the failure of the Referee to find that any subsequent agreement existed. For these reasons the statements in Petitioners' Brief relating to a subsequent agreement are improper, immaterial and are not entitled to any consideration in the determination of this matter.

David, Oregon Mutual Life Insurance Company and Respondent herein were defendants, a Judgment was entered ordering the General Electric Company to pay to Respondent all rentals due under the renewal lease of December 1, 1942 (R. 159, 160). Ever since the entry of said Judgment, Respondent has collected the rentals from the lessee (R. 161).

On February 17, 1944, Respondent commenced this proceeding by filing his petition in the Bankruptcy Court alleging that the indebtedness, aggregating $25,000.00, formerly owed to David under the provisions of the agreement of April 20, 1933, (Ex. Q.Q.) had been paid. Respondent offered to pay the balance due Oregon Mutual Life Insurance Company. Respondent prayed for an order requiring David and his wife to deliver to him the deed held in escrow by David to secure the payment of said indebtedness.

The Petition alleged:

"6. That your Petitioner * * * * is now in possession of the General Electric Building." (R. 13)

Petitioners filed an Answer thereto, denying certain averments of the Petition, *but they did not deny the foregoing averment that Respondent was in possession* (R. 27). Petitioners made numerous affirmative allegations. They did not allege that they were in possession of the property. Nor did they, at any stage of the proceedings, until their appeal to the Circuit Court of Appeals, object to the summary proceedings upon that ground, or that they were adverse claimants, or that the Bankruptcy Court did not have possession of the property.

Hearing was had upon the merits. The Referee entered findings (R. 41) wherein he found, among other things, that (1) Respondent was in possession of the property, subject only to the possession of General Electric Company, as lessee (R. 45); (2) the indebtedness of $25,000.00 had been paid to David in full by bankrupt (R. 54); (3) bankrupt was the beneficial owner of the property (R. 55), and (4) David held legal title as security only for said indebtedness (R. 55).[2]

Pursuant thereto the Referee entered an order requiring Petitioners to turn over and deliver to Respondent the original deed signed and executed by Petitioners and held by them in escrow (R. 57).

Petitioners filed a Petition For Review by the District Court of the Referee's Order (R. 62). In their Petition they admitted that the property was in possession of Respondent (R. 80).

The District Court affirmed the Referee's Order (R. 99). The Circuit Court of Appeals, 9th Circuit, affirmed the District Court (156 F. (2d) 27, and R. 518).

Petitioners' application for Writ of Certiorari is predicated upon the contention that the Bankruptcy Court did not have summary jurisdiction. The Circuit Court of Appeals upheld the Bankruptcy Court's jurisdiction

---

[2]In Oregon, a deed absolute on its face but held as security for an indebtedness is construed as a mortgage: *Conley v. Henderson*, 158 Ore. 309, 75 P. (2d) 746; *Harper v. Interstate Brewery Company*, 168 Ore. 26, 120 P. (2d) 757.

In Oregon a mortgage does not vest legal or equitable title in a mortgagee. It gives him a lien only: *Investers Syndicate et al v. Smith et al*, 105 F. (2d) 611 (C.C.A. 9) construing 8-211, *Oregon Compiled Laws Anno.*

In Oregon a mortgagee has no right to possession unless such right is provided for in the mortgage: *Investors Syndicate et al v. Smith et al, supra; State, ex rel, Nayberger v. McDonald*, 128 Ore. 684, 274 Pac. 1104.

upon the following grounds:

(1) The Bankruptcy Court's possession of the property was admitted by the pleadings.

(2) Petitioners consented to summary jurisdiction by failing to object to the exercise thereof.

The record is nil of any objection to the Referee, protesting summary jurisdiction. Petitioners contend that certain language in their Answer to Respondent's Petition for a turnover contained these objections. The questions presented to this Court are, therefore, as follows:

(1) May the Referee's findings, that Respondent was in possession, now be disturbed?

(2) Was the Bankruptcy Court's possession admitted by the pleadings?

(3) Did Petitioners object to summary jurisdiction?

SUMMARY OF RESPONDENT'S ARGUMENT

I. TO POINTS I, II AND III, PETITIONERS' ARGUMENT (Petitioners' Brief, Pages 15 and 16).

A. Possession Confers Summary Jurisdiction.

B. Referee's Findings That Respondent Was In Possession Is Conclusive In This Case.

II. TO POINT IV, PETITIONERS' ARGUMENT (Petitioners' Brief, Page 17).

Possession Of Property In Bankruptcy Court Confers Jurisdiction To Summarily Determine Title Thereto And To Order Conveyance.

II (1). TO POINT IV (1), PETITIONERS' ARGUMENT (Petitioners' Brief, Page 18).

Respondent's Allegation Of Possession In His Petition For Turnover Was A Material Averment Of Ultimate Fact.

II (2). TO POINT IV (2), PETITIONERS' ARGUMENT (Petitioners' Brief, Page 20).

Federal Rules Of Civil Procedure Are Applicable To Summary Proceedings in Bankruptcy.

II (3). TO POINT IV (3), PETITIONERS' ARGUMENT (Petitioners' Brief, Page 21).

III. TO POINT V, PETITIONERS' ARGUMENT (Petitioners' Brief, Page 22).

A. Submission Of Cause On Merits Without Protest To Jurisdiction Constitutes Consent.

B. Trial By Summary Proceedings Constitutes Due Process Of Law And Right To Trial By Plenary Suit Is A Procedural Right Which May Be Waived.

IV. TO POINT VI, PETITIONERS' ARGUMENT (Petitioners' Brief, Page 23).

Petitioners' Answer Contains No Protest To Summary Jurisdiction.

V. TO POINT VII, PETITIONERS' ARGUMENT (Petitioners' Brief, Page 24).

VI. TO POINT VIII, PETITIONERS' ARGUMENT (Petitioners' Brief, Page 25).

VII. TO POINT IX, PETITIONERS' ARGUMENT (Petitioners' Brief, Page 27).

Where Requisite Jurisdictional Averment Of Possession Is Alleged In Petition For Turnover And Is Not Denied, Objection To Jurisdiction Must Assert The Ground Of Objection To Summary Jurisdiction.

VIII. TO POINT X, PETITIONERS' ARGUMENT (Petitioners' Brief, Page 29).

If Jurisdictional Objection Is Based Upon Wrong Reason, Objection Is Ineffectual.

IX. TO POINT XI, PETITIONERS' ARGUMENT (Petitioners' Brief, Page 30).

ARGUMENT

I. To Points I, II and III, Petitioners' Argument (Petitioners' Brief, Pages 15 and 16).

Petitioners urge that since this proceeding was not instituted under Section 60, 67 or 70 of the Bankruptcy Act, the Bankruptcy Court had no summary jurisdiction unless Petitioners consented thereto. They do concede that if Respondent had possession of the property the Bankruptcy Court had summary jurisdiction.

Respondent *did* have possession (which was also admitted) and jurisdiction was thereby had irrespective as to whether Petitioners consented or not.

A. Possession Confers Summary Jurisdiction.

A bankruptcy court has the power to adjudicate summarily, rights and claims to property which is in the actual or constructive possession of the Court.[3]

This power is not based upon any statute. It arises out of possession.[4]

B. Referee's Findings That Respondent Was In Possession Is Conclusive In This Case.

As was pointed out in Respondent's Statement Of The Case, evidence was received (R. 161) and the Referee found that Respondent was in possession of the General Electric Building (R. 45).

Moreover Petitioners make no assignment of error with respect to these findings. Consequently such findings must be accepted by this Court.[5]

---

[3] *Cline v. Kaplan*, 89 Law. Ed. 97, 323 U.S. 97, 65 S. Ct. 155;
Louisville Trust Co. v. Comingor, 46 Law. Ed. 413, 184 U.S. 18, 22 S. Ct. 293;
Bank of California v. McBride, 132 F. (2d) 769 (C.C.A. 9).

[4] *Murphy v. John Hofman Co.*, 29 S. Ct. 154, 211 U.S. 562, 53 Law. Ed. 327.

[5] Bankruptcy General Order XLVII; *In Re Eastern Oil Co.*, 100 F. (2d) 341 (C.C.A. 9);
Hill v. Douglass, 78 F. (2d) 851 (C.C.A. 9);
Remington on Bankruptcy, Fifth Edition, Volume 8, Section 3795, p. 119;
Ott v. Thurston, et al., 76 F. (2d) 368 (C.C.A. 9) at page 370: "The questions of fact having been passed upon by the referee and the District Court, they cannot be disturbed here upon appeal unless the findings are clearly and unmistakably erroneous."

II. To Point IV, Petitioners' Argument (Petitioners' Brief, Page 17).

Possession Of Property In Bankruptcy Court Confers Jurisdiction To Summarily Determine Title Thereto And To Order Conveyance.

Respondent having established that he was in possession the Bankruptcy Court had exclusive summary jurisdiction to determine the question of title[6] and to compel a conveyance from David.[7]

II (1). To Point IV (1), Petitioners' Argument (Petitioners' Brief, Page 18).

Respondent's Allegation Of Possession In His Petition For Turn Over Was A Material Averment Of Ultimate Fact.

Petitioners argue (without citation of authority) that Respondent's allegation that he was in possession is a conclusion of law. This contention is without merit. Respondent's allegation of possession was a direct and material averment of an ultimate fact.[8]

---

[6] *Ex Parte Baldwin*, 78 Law. Ed. 1020, 291 U.S. 610, 54 S. Ct. 551; 78 Law. Ed. at page 1023: "But the exclusive jurisdiction acquired by the bankruptcy court through taking possession of the interurban railway under claim of title was not limited to the prevention of interference with the use of the land. (citing cases) The jurisdiction extends also to the adjudication of questions respecting the title. (citing cases)."

[7] *City of Long Beach, et al. v. Metcalf*, 103 F. (2d) 483 (C.C.A. 9); *In re Robinson*, 36 F. Supp. 11 (D. C., Mass.); *Bank of California v. McBride*, 132 F. (2d) 769 (C.C.A. 9); *White v. Barnard*, 29 F. (2d) 510 (C.C.A. 1); *United States National Bank v. Pamp*, 77 F. (2d) 9 (C.C.A. 8); *In re Logan*, 196 Fed. 678 (D.C., New York); *In re Oswegatchie Chemical Products Corporation*, 279 Fed. 547 (C.C.A. 2).

[8] *Parley's Park Silver Mining Company v. Kerr*, 9 S. Ct. 511, 130 U.S. 256, 32 Law. Ed. 906 at 908: "The complaint in the present case, in compliance with the requirements of the Practice Act of Utah Territory, states in concise language *the two ultimate facts*, upon which the claim for relief depends, *that the plaintiff is in possession of the property*, and that the defendant claims an interest or an estate therein adverse to him. These are sufficient to require the nature and character of the adverse claim on the part of the defendant to be set up, inquired into, and judicially determined, and the question of title finally settled." (Emphasis supplied.)

II (2). To Point IV (2), Petitioners' Argument (Petitioners' Brief, Page 20).

FEDERAL RULES OF CIVIL PROCEDURE ARE APPLICABLE TO SUMMARY PROCEEDINGS IN BANKRUPTCY.

Petitioners maintain under this point first, that the Federal Rules of Civil Procedure are not applicable to these proceedings, and, second, that the Circuit Court of Appeals erred when it held that Petitioners' failure to deny Respondent's allegation of possession constituted an admission thereof by virtue of Rule 8(d).

This position as a proposition of law is untenable and is not supported by authority.

General Order 37 of General Orders in Bankruptcy prescribes that the Rules of Civil Procedure shall be followed in bankruptcy proceedings.[9]

That the Rules of Civil Procedure apply to summary proceedings in bankruptcy was recognized in *Zydney v. New York Credit Men's Ass'n*, 113 F. (2d) 986 (C.C.A. 2). A creditor instituted summary proceedings against the bankruptcy trustee to recover property pledged to the petitioner to secure an indebtedness. The trustee filed no answer to the petition but an answering affidavit in argumentative form. The Court censured the failure of the referee to follow the Rules of Civil Procedure and held that since the trustee's answering affidavit was not

[9] G. O. XXXVII: "In proceedings under the Act the Rules of Civil Procedure for the District Courts of the United States shall, in so far as they are not inconsistent with the Act or with these general orders, be followed as nearly as may be."

an answer as required by the Rules of Civil Procedure the allegations of the petition were admitted. The Court said (Page 987):

> "The failure to follow the proper practice has caused us a good deal of trouble in understanding the case, and in dealing with the record. General Order XXXVII, 11 U.S.C.A. following section 53, provides that the Rules of Civil Procedure, 28 U.S.C.A. following section 723c, shall be 'followed as nearly as may be' in bankruptcy proceedings, though 'the court may * * * * modify the rules for the preparation or hearing of any particular proceeding'. A referee acts as the court of bankruptcy in a reclamation proceeding, § 1 (9), and so far as we can see, there was no occasion to 'modify' the Rules. It was of course entirely proper for the trustee to examine Zydney and the Bankrupt's officers in order to prepare his answer; but the answer, when prepared, should have been really an answer; i.e., it should have conformed to Rule 8(b), Rules of Civil Procedure. *The Trustee's 'answering affidavit' was not an answer at all; and the petition really stood admitted. Rule* 8 (*d*)." (Emphasis supplied).

At page 988 the Court said:

> "The Rules required the trustee to file an answer under Rule 8(b), and then that the cause should be noticed for hearing, like an action. This is by far the simplest and speediest way in the end; *and the only way now authorized by law.*" (Emphasis supplied).

In *Moonblatt v. Kosmin,* 139 F. (2d) 412 (C.C.A. 3) the bankruptcy trustee filed a petition with the referee for a turnover order against bankrupt's wife. She filed an answer to said petition which contained no objection to jurisdiction. A question presented upon appeal was the applicability of the Rules of Civil Pro-

cedure to summary proceedings. In holding that the Rules were applicable, the Court said at page 414:

> "The Federal Rules of Civil Procedure apply to bankruptcy cases by virtue of General Order No. 37, 11 U.S.C.A. following section 53. General Order No. 37 was in effect on February 13, 1939. It provides that in proceedings under the Bankruptcy Act the Rules of Civil Procedure for the District Courts of the United States shall be followed insofar as their provisions are not inconsistent with those of the Bankruptcy Act or of the General Orders."

It is thus definitely established that the Federal Rules of Civil Procedure are applicable to summary proceedings in bankruptcy.

In support of their position upon this point Petitioners rely upon *In re Bender Body Co.*, 47 F. Supp. 224. A consideration of the District Court's opinion discloses that the Court relied upon an inapplicable and therefore erroneous authority to support its decision.

The authority relied upon by the Court was *Remington On Bankruptcy, Section* 31, to the effect that General Order 37 refers only to suits and proceedings other than those in the Bankruptcy Court. Said Section 31 as edited by Remington is entitled "Federal Equity Rules" and relates to the old General Order in Bankruptcy number 37, which became inoperative on January 16, 1939. The text is not a consideration of the present General Order 37 nor does it purport to be.

Upon appeal (139 F. (2d) 128, C.C.A. 6) the Court held that the present General Order 37 makes the Federal Rules of Civil Procedure applicable to bankruptcy proceedings. The case was affirmed on other grounds.

II (3). To Point IV (3), Petitioners' Argument (Petitioners' Brief, Page 21).

Petitioners contend that Respondent's petition failed to allege facts sufficient to support summary jurisdiction and that, therefore, Petitioners' failure to deny any particular allegation of the Petition could not confer jurisdiction.

The answer to this contention is that Respondent's Petition alleged that he was in possession. This allegation not denied was an admission of said possession thereby vesting jurisdiction of the proceeding in the Bankruptcy Court.

III. To Point V, Petitioners' Argument (Petitioners' Brief, Page 22).

Petitioners concede that consent confers summary jurisdiction. They later assert, however, that they objected to summary jurisdiction and that they did not give their consent.

Respondent at this point desires to present the following established general principles pertaining to the doctrine of consent.

A. Submission Of Cause On Merits Without Protest To Jurisdiction Constitutes Consent.

It has been uniformly held that a submission of a cause on its merits without protest to the exercise of summary jurisdiction constitutes consent to summary

jurisdiction and a waiver of all objections thereto.[10]

B. Trial By Summary Proceedings Constitutes Due Process Of Law And Right To Trial By Plenary Suit Is A Procedural Right Which May Be Waived.

Summary procedure is not a denial of due process of law.[11]

The right of an adverse claimant to trial by plenary suit is a procedural right, a privilege only, which he may waive by failure to raise an appropriate objection in due time.[12]

IV. To Point VI, Petitioners' Argument (Petitioners' Brief, Page 23).

Petitioners' Answer Contains No Protest To Summary Jurisdiction.

In support of Petitioners' argument that they protested to summary jurisdiction, they rely solely upon

---

10 *First State Bank v. Fox.* 10 F. (2d) 116 (C.C.A. 8);
Bachman v. McCluer, 63 F. (2d) 580 (C.C.A. 8);
In re Murray, 92 F. (2d) 612 (C.C.A. 7);
In re Realty Associates Securities Corporation, 98 F. (2d) 722, (C.C.A. 2);
In re Pinsky-Lapin & Co., 98 F. (2d) 776 (C.C.A. 2);
Bagley v. Rowley, 127 F. (2d) 139 (C.C.A. 6);
In re West Produce Corporation, 118 F. (2d) 274 (C.C.A. 2);
Moonblatt v. Kosmin, 139 F. (2d) 412 (C.C.A. 3).

11 *Shor v. McGregor,* 108 F. (2d) 421 (C.C.A. 5);
U. S. National Bank v. Pamp, 83 F. (2d) 493 (C.C.A. 8).

12 *In the matter of Tax Service Association of Illinois,* 305 U.S. 160, 59 S. Ct. 131, 83 Law. Ed. 100 at page 103: "Since the parties had only a procedural right to have these issues tried in a plenary suit, they were at liberty to waive this right."
McDonald v. Plymouth County Trust Company, 286 U.S. 263, 52 S. Ct. 505, 76 Law. Ed. 1093 at page 1095: "But it does not follow that this privilege, extended for the benefit of a suitor, may not, like the right to trial by jury, be waived, * * * *."

some language in their Answer to the Respondent's Petition for a turnover order. Indeed, they may not rely upon any other word, act or writing said or done, because the record is void of any assertion to the Referee at any stage of the proceedings that Petitioners were objecting to summary jurisdiction.

Petitioners assert their objection was contained in the following statement of their Answer: "* * * appearing specially in this answer to show cause, and not waiving any of their rights with respect to the insufficiency of the Petition for turnover and restraining order, and respectfully represent * * *" (R. 27).

Notwithstanding Petitioners' statement the Answer was not a special appearance because the allegations went to the merits of the cause.[13] The remaining portion of the quoted paragraph purports merely to be a reservation of rights with respect to the insufficiency of the Petition itself. The Petition was sufficient insofar as it alleged facts vesting jurisdiction in the Bankruptcy Court because it alleged that the Bankruptcy Court was in possession of the property.

Nothing is contained in the foregoing language as indicating or suggesting that Petitioners were objecting to the exercise of summary jurisdiction by the Court.

The only other language in Petitioners' Answer which they claim to be a protest is as follows: "* * * said proposed order if carried into execution would be the

---

[13] *Davis v. Davis*, 305 U.S. 32, 59 S. Ct. 3, 83 Law. Ed. 26 at Page 30: "The assertion in her plea that it was special and made for the sole purpose of challenging jurisdiction is of no consequence, if in fact it was not so limited. (citing cases)."

taking of property without due process of law and finally the Court is without jurisdiction in the premises." (R. 35).

Respondent has already shown that determination of rights by summary proceedings in bankruptcy is not a denial of due process.[14]

The allegation, "* * * the Court is without jurisdiction in the premises", unsupported by any allegation of fact showing wherein there is lack of jurisdiction is a conclusion of law and insufficient as a protest.[15]

The final expression of this Court on the law of consent is contained in *Cline v. Kaplan,* 323 U.S. 97, 65 S. Ct. 155, 89 Law. Ed. 97, wherein the Court said at page 100:

> "But whether or not there was the necessary consent upon which its power to proceed may depend is, as is so often true in determining consent, a question depending on the facts of the particular case. And so we turn to the facts of this case."

Petitioners consented to summary jurisdiction as established by the following:

1. Respondent alleged in his Petition for turnover that he was in possession.

---

[14] *Shor v. McGregor,* 108 F. (2d) 421 (C.C.A. 5); *U. S. National Bank v. Pamp,* 83 F. (2d) 493 (C.C.A. 8).

[15] *Ritchie v. McMullen,* 159 U.S. 235, 16 S. Ct. 171, 40 Law. Ed. 133 at page 135: "The general averments, in the first part of the answer, that the judgment was 'an irregular and void judgment,' and, in the second part, that 'said judgment was irregular,' and 'without any jurisdiction or authority on the part of the court to enter such a judgment upon the facts and upon the pleadings in said action,' are but averments of legal conclusions, and wholly insufficient to impeach the judgment without specifying the grounds upon which it is supposed to be irregular and void, or without jurisdiction or authority to enter it. Cowan v. Braidwood, 1 Man. & G. 882, 2 Scott, N.R. 138."

2. Petitioners did not deny this allegation and it was thus admitted.

3. Petitioners did not allege in their Answer either that they were in possession of the property or that Respondent was not in possession.

4. Petitioners never in any way brought to the Referee's attention that they had objection to summary jurisdiction, and did in fact voluntarily and willingly submit the cause on its merits.

5. Petitioners in their Petition for Review to the District Court admitted that the Respondent was in possession (R. 80, par. "(3)").

If Petitioners' position is sustained they will have had a fair and complete hearing upon the merits without objection, an opportunity to gamble for a successful result upon that hearing, and when they lost, a further opportunity to another hearing upon the merits. As was stated in the opinion of the Circuit Court, "He will not be permitted to speculate on the outcome of the proceedings, and then, if he loses the decision, for the first time understandably protest the procedure." (R. 521).

V. To Point VII, Petitioners' Argument (Petitioners' Brief, Page 24).

Petitioners argue that the lower Court should not have treated their failure to deny Respondent's possession as constituting an element of consent.

Consent is a question depending upon the facts of a

particular case.[16] Petitioners' failure to deny possession was a fact and circumstance which the Court was entitled to take into consideration.

VI. To Point VIII, Petitioners' Argument (Petitioners' Brief, Page 25).

Petitioners rely in support of their Petition for Writ of Certiorari upon *Louisville Trust Co. v. Comingor,* 184 U.S. 18, 22 S. Ct. 293, 46 Law. Ed. 413, and *Cline v. Kaplan,* 323 U.S. 97, 65 S. Ct. 155, 89 Law. Ed. 97. They contend that based upon these authorities submission of the cause upon the merits did not constitute their consent to jurisdiction because of the alleged objections to jurisdiction contained in Petitioners' Answer.

These cases are clearly distinguishable. In each the objection to summary jurisdiction was appropriately raised and brought to the Court's attention in such a manner that the Referee was specifically informed that the adverse claimant objected to the hearing.

In *Louisville Trust Co. v. Comingor,* supra, the Court stated the objection to jurisdiction was asserted as follows:

> "Comingor tendered an amended response before the Referee, setting forth that as was shown by the pleadings, records, and evidence in the case, and the entire proceedings had, neither that court nor the referee in bankruptcy had any jurisdiction, either of the respondent or the matter involved, to make any such orders or require respondent to answer thereto, * * * and that neither that court nor the referee in bankruptcy could proceed against

[16] *Cline v. Kaplan,* 89 Law. Ed. 97, 323 U.S. 97, 65 S. Ct. 155.

respondent as attempted by order or rule to pay over or by summary process."

In *Cline v. Kaplan, supra,* examination of the opinion of the Circuit Court of Appeals (142 F. (2d) 301) discloses that an oral motion was made before the Referee to dismiss on the ground that because appellants were adverse claimants the Court was without summary jurisdicition. Briefs were submitted on the jurisdictional question before decision by the Referee.

VII. To Point IX, Petitioners' Argument (Petitioners' Brief, Page 27).

WHERE REQUISITE JURISDICTIONAL AVERMENT OF POSSESSION IS ALLEGED IN PETITION FOR TURNOVER AND IS NOT DENIED, OBJECTION TO JURISDICTION MUST ASSERT THE GROUND OF OBJECTION TO SUMMARY JURISDICTION.

Petitioners argue that only their consent could give jurisdiction and that they had the right to withhold their consent for any reason, assigned or unassigned, and that the general language contained in their Answer to the Turnover Petition was a sufficient objection establishing their non consent.

But, as Respondent has already shown, possession of the property in the Bankruptcy Court gives it exclusive summary jurisdiction irrespective of consent and despite objection to jurisdiction. Respondent alleged his possession. Procedurally this was admitted. The requisite jurisdictional fact having been admitted objection to

jurisdiction could not be raised. Had there been no admission of possession even then explicitness is required of the ground upon which objection is made.[17] Else upon what basis may the Referee conclude that he may not have summary jurisdiction when the very fact establishing summary jurisdicition is alleged and uncontroverted?

VIII. To Point X, Petitioners' Argument (Petitioners' Brief, Page 29).

If Jurisdictional Objection Is Based Upon Wrong Reason, Objection Is Ineffectual.

Respondents contend that their alleged ground of objection was that another suit was pending in the State Court for the same relief (this was not asserted as an objection to jurisdiction) and that such alleged objection, although on untenable ground, was effectual to show lack of consent.

The fact is, however, that no ground of objection was asserted before the Referee's final order.[18]

Petitioners in their Petition for Review to the District Court asserted denial of due process and lack of jurisdiction upon the ground only (then advanced for the first time) that a suit was pending in the State Court for the same relief (R. 76). Had objection upon this ground been asserted in due time it would neverthe-

---

17 *In re Realty Associates Securities Corporation*, 98 F. (2d) 722 (C.C.A. 2).

18 Objection to jurisdiction must be interposed before the entry of the Referee's final order: *Cline v. Kaplan*, 323 U.S. 97, 65 S. Ct. 155, 89 Law. Ed. 97; *Hall v. Goggin, et al*, 148 F. (2d) 774 (C.C.A. 9).

less have been ineffectual because it was not predicated upon the proper ground.[19]

IX. To Point XI, Petitioners' Argument (Petitioners' Brief, Page 30).

Petitioners conclude by asserting that the decision of the Circuit Court is in direct conflict with *Louisville Trust Co. v. Comingor*, supra, and *Cline v. Kaplan*, supra.

Respondent has distinguished these decisions. The objection to jurisdiction in each of those cases was explicit and intelligible. The Referee was fully apprised that the adverse claimant in each of said cases objected to summary jurisdiction and the specific grounds upon which the objection was made.

In the case at bar there was no objection to the exercise of summary jurisdiction.

IT IS RESPECTFULLY SUBMITTED that Petition for Writ of Certiorari be denied.

ABE EUGENE ROSENBERG,
ROBERT F. MAGUIRE,
Attorneys for Respondent.

---

[19] *In re Realty Associates Securities Corporation*, 98 F. (2d) 722 (C.C.A. 2), at 725: "Appellants' contention that a summary proceeding could not properly be brought to reach the rentals is plainly without substance. In the first place the objection to the proceeding was based upon lack of proper service of the petition and order to show cause. That defect was cured. *If there ever was any right to attack the jurisdiction of the court to entertain a summary proceeding because of the nature of the issues involved, it was waived by failure to object on that ground and by proceeding to a trial on the merits.*" (Emphasis supplied).